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Antonina Marleen Yarendra v Chai Wei Chung

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(A)-857–05 OF 2016
ROHANA YUSUF, IDRUS HARUN AND MARY LIM JJCA
21 APRIL 2017

C *Land Law — Caveats — Removal of — Respondent who bought property at auction sale applied to High Court to remove appellant's private caveat on property — Court in granting application ordered appellant to pay respondent compensation for loss/damage caused by entry of the caveat — Respondent failed to adduce any evidence of loss/damage suffered — Whether order for payment of*
D *compensation wrong in the circumstances — Whether court order for removal of caveat under s 327 of National Land Code ('the NLC') did not automatically mean order for compensation under s 329(1) would follow — Whether order for payment of compensation was discretionary only to be exercised if the circumstances warranted it — Whether phrase used in s 329 of the NLC was 'shall be liable to pay*
E *compensation' and not 'shall pay compensation' — Whether respondent in any event disentitled himself from any award of compensation for failing to carry out land search for encumbrances on property before bidding for same*

F The appellant entered into a sale and purchase agreement ('SPA') to buy a service apartment ('the property') from its original owners who, at the time, had charged the property to a bank ('UOB') in return for a loan. After paying the original owners a down-payment, the appellant secured a loan from a bank to finance the purchase. The sale, however, was not completed and the appellant sued the original owners for breach of the SPA. Prior to filing the suit,
G the appellant lodged a private caveat against the property. Meanwhile, following the original owners' default under their loan, UOB put up the property for sale by way of public auction. The respondent successfully bid for the property at the auction. Thereafter, when he carried out a search on the property at the land office, the respondent discovered the existence of the
H appellant's caveat and wrote to her to remove the same. When she refused to do so, the respondent applied to the High Court for its removal. The High Court granted the respondent's application and also ordered the appellant to pay the respondent damages as assessed by the senior assistant registrar ('the SAR'). The SAR assessed the damages at RM81,032.32 which included charges for late
I payment, solicitor's costs and loss of rentals. The instant appeal was not against the order for removal of the caveat but only against the order to pay damages to the respondent. The appellant argued that under s 329(1) of the National Land Code ('the NLC') the court had a discretion not to award compensation if a caveat was not wrongfully entered. The respondent, however, argued that it was

mandatory for the court to order compensation to be paid when it ordered a caveat to be removed. Section 329(1) of the NLC provided that 'Any person or body who, wrongfully or without reasonable cause, secures the entry of, or fails to withdraw, any private caveat shall be liable to pay compensation to any person or body who thereby suffers any damage or loss' while s 327(1) of the NLC provided that 'Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court ... may make such order on the application as it may think just'.

Held, allowing the appeal and setting aside the order that the appellant pay damages to the respondent:

(1) Section 329 of the NLC, which had to be read with s 327, did not provide, in any way, for the mandatory payment of compensation. To suggest that s 329(1) was mandatory in that the Court had to order compensation upon a removal of a caveat under s 327 was to read into s 329 words and intention that were just not there. Section 329(1) provided for a liability to pay; it did not provide that the appellant shall pay compensation for the wrongful entry of the caveat. Just as the term 'shall be liable to' under criminal law was not mandatory in effect and purpose and left the court with absolute discretion to mete out suitable punishment on the particular facts, a fortiori, the position was equally true for like provisions in civil law such as was found in s 329(1). In the absence of clear and express words to the contrary, any order that compensation be paid was a matter of discretion subject to the establishment in law and on the facts that compensation was required to meet the ends of justice. The order to pay compensation was not automatic but subject to proof of the existence of damage or loss suffered. Since there was none in this case, for that reason alone, the appeal had to be allowed as the High Court had granted the order for payment of damages seemingly as a matter of course (see paras 9, 11, 15–16, 20 & 23).

(2) Liability to pay compensation under s 329(1) of the NLC only arose where the person had suffered damage or loss by virtue of the caveat. This clearly meant that before the order for compensation could be made, the court had to be satisfied that damage or loss by reason of the caveat had been established on the facts and in law. The respondent had to prove on balance of probabilities that he had suffered a particular damage or loss 'thereby', or as a result of, the wrongful act of the appellant. Damage or loss was not presumed for this wrongful act; it had to be established in law and on the facts. If the respondent failed to discharge that burden, the court could either refuse compensation or order nominal compensation to be paid. Until and unless the respondent had discharged that burden,

it was an improper exercise of discretion by the court to order any compensation or assessment of compensation as was done in this case (see paras 14 & 22).

(3) There was no evidence before the court below of any damage or loss that the respondent claimed to have suffered. There was no evidence that the deposit he had paid had been forfeited or that he had suffered a loss of investment or loss of profit. In the absence of proof, there was no basis for any exercise of discretion to order payment of compensation by the appellant. In order to direct any assessment, the court below was also obliged to identify, with evidence led by the respondent, the particular items or heads of damage or loss that the respondent purportedly sustained. With the complete absence of such proof, the High Court ought to have dismissed this ancillary relief (see para 35).

(4) The respondent failed to conduct a search on the property until after he had successfully bid at the public auction and made the necessary arrangements for the loan. Under such circumstances, the appellant could not blame the appellant for any damage or loss he claimed to have suffered. It would be reasonable to conclude that he bid for the property knowing of, and despite, the encumbrances, including the appellant's caveat. There were specific provisions, particularly conditions 14 and 16, in the conditions of sale attached to the proclamation of sale, warning that the auction sale was subject to any encumbrances including, as it turned out, the appellant's caveat. Had the respondent conducted the search before making his bid, as he was obliged to do under the clear terms of the proclamation of sale, he would have discovered the existence of the caveat. If he had bid despite knowing of the existence of the caveat, he could not later complain of any damage or loss resulting from or related to the removal of the caveat. In the circumstances, the respondent had clearly disentitled himself to any compensation under s 329(1) of the NLC (see paras 32–34).

[Bahasa Malaysia summary

Perayu telah menandatangani suatu perjanjian jual beli ('PJB') untuk membeli sebuah pangsapuri servis ('hartanah itu') daripada pemilik asal yang, pada masa itu, telah mencagarkan hartanah itu kepada sebuah bank ('UOB') bagi maksud mendapatkan pinjaman. Setelah membayar bayaran pendahuluan kepada pemilik asal, perayu telah mendapatkan pinjaman daripada sebuah bank untuk membiayai pembelian itu. Penjualan itu, walau bagaimanapun, tidak dapat disempurnakan dan pihak perayu telah menyaman pemilik asal atas kegagalan mematuhi PJB itu. Sebelum memfailkan saman, pihak perayu telah memasukkan suatu kaveat persendirian ke atas hartanah itu. Sementara itu, akibat kegagalan pemilik asal di bawah pinjaman mereka, pihak UOB telah menjual hartanah itu melalui lelongan awam. Pihak responden telah berjaya membida hartanah itu semasa lelongan. Kemudian, semasa responden

membuat carian ke atas hartanah itu di pejabat tanah, pihak responden mendapati tentang kewujudan kaveat oleh perayu dan telah menulis surat kepada perayu untuk membatalkan kaveat itu. Apabila perayu enggan berbuat demikian, pihak responden telah memohon kepada Mahkamah Tinggi untuk membatalkan kaveat itu. Mahkamah Tinggi telah membenarkan permohonan responden dan memerintahkan perayu untuk membayar ganti rugi kepada responden sebagaimana yang dinilaikan oleh penolong kanan pendaftar ('PKP'). PKP telah membuat penilaian ganti rugi pada kadar RM81,032.32 yang juga termasuk caj bayaran lewat, kos peguam dan kerugian sewaan. Rayuan ini bukanlah terhadap perintah pembatalan kaveat itu tetapi hanya ke atas perintah untuk membayar ganti rugi kepada responden. Perayu menghujahkan bahawa di bawah s 329(1) Kanun Tanah Negara ('KTN') mahkamah mempunyai budi bicara untuk tidak memberikan pampasan sekiranya kaveat telah tidak dimasukkan secara salah. Pihak responden, walau bagaimanapun, menghujahkan bahawa ia m memerintahkan suatu kaveat dibatalkan. Seksyen 329(1) KTN menyatakan bahawa 'Any person or body who, wrongfully or without reasonable cause, secures the entry of, or fails to withdraw, any private caveat shall be liable to pay compensation to any person or body who thereby suffers any damage or loss' manakala s 327(1) KTN pula memperuntukkan 'Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court ... may make such order on the application as it may think just'.

Diputuskan, membenarkan rayuan dan mengenepikan perintah supaya perayu membayar ganti rugi kepada responden:

(1) Seksyen 329 KTN, yang perlu dibaca bersama s 327, tidak memperuntukkan, dalam apa-apa cara pun, bagi suatu pembayaran pampasan mandatori. Untuk mencadangkan bahawa s 329(1) adalah mandatori yang mana mahkamah hendaklah memerintahkan pampasan dibayar apabila suatu kaveat di bawah s 327 dibatalkan adalah tindakan membaca perkataan dan niat s 329 yang tidak ada. Seksyen 329(1) memperuntukkan bagi suatu liabiliti untuk membayar; ia tidak memperuntukkan bahawa perayu hendaklah membayar pampasan kerana memasukkan kaveat secara salah. Sebagaimana terma 'shall be liable to' di bawah undang-undang jenayah adalah tidak mandatori secara kesan atau sebab dan memberikan mahkamah budi bicara mutlak untuk memberikan hukuman yang wajar berdasarkan fakta-fakta tertentu, kedudukan yang sama adalah terpakai bagi suatu peruntukan yang sama dalam undang-undang sivil sepertimana yang dijumpai dalam s 329(1). Jika tidak terdapat perkataan yang jelas dan terang untuk menunjukkan yang sebaliknya, mana-mana perintah supaya pampasan dibayar merupakan suatu budi bicara tertakluk kepada ketetapan undang-undang dan berdasarkan fakta bahawa pampasan hendaklah adil. Perintah untuk membayar pampasan adalah tidak automatik tetapi

A tertakluk kepada pembuktian kewujudan kerosakan atau kerugian yang dialami. Memandangkan tidak terdapat apa-apa kerosakan atau kerugian dalam kes ini, atas alasan itu sahaja, rayuan ini hendaklah dibenarkan memandangkan Mahkamah Tinggi telah memerintahkan pembayaran ganti rugi itu atas alasan terdapat kerosakan dan kerugian yang dialami (lihat perenggan 9, 11, 15–16, 20 & 23).

(2) Liabiliti untuk membayar pampasan di bawah s 329(1) KTN hanya berbangkit apabila seseorang itu telah mengalami kerosakan atau kerugian akibat daripada kaveat itu. Ini membawa maksud dengan jelas bahawa sebelum suatu perintah untuk membayar pampasan boleh dibuat, mahkamah hendaklah berpuas hati bahawa kerosakan atau kerugian akibat daripada kaveat itu telah dibuktikan pada fakta dan juga undang-undang. Pihak responden hendaklah membuktikan atas imbangan kebarangkalian bahawa dia telah menanggung suatu kerosakan atau kerugian khusus kerana itu, atau akibat daripada, salah tindakan oleh perayu. Kerosakan atau kerugian tidak boleh dibuat anggapan bagi maksud salah tindakan ini; ia hendaklah dibuktikan secara undang-undang atau berdasarkan fakta. Sekiranya pihak responden gagal untuk melepaskan beban ini, mahkamah boleh sama ada menolak pembayaran pampasan itu atau memerintahkan pampasan yang sedikit sahaja dibayar. Sehinggalah pihak responden telah melepaskan beban itu, adalah merupakan suatu tindakan budi bicara yang tidak wajar oleh mahkamah untuk memerintahkan suatu pampasan atau penilaian pampasan dibuat sebagaimana yang dilakukan dalam kes ini (lihat perenggan 14 & 22).

(3) Tidak terdapat keterangan di hadapan mahkamah di bawah mengenai apa-apa kerosakan atau kerugian yang dikatakan dialami oleh responden. Tidak terdapat keterangan yang menunjukkan bahawa deposit yang telah dibayar oleh responden telah dirampas atau responden telah mengalami kerugian akibat pelaburan atau kerugian pendapatan. Dalam ketiadaan apa-apa bukti, tidak terdapat asas untuk membuat apa-apa pertimbangan budi bicara untuk memerintahkan pembayaran pampasan oleh perayu. Bagi maksud memerintahkan suatu penilaian dibuat, mahkamah di bawah hendaklah juga mengenal pasti, melalui keterangan yang diberikan oleh responden, perkara khusus atau apa-apa kerosakan atau kerugian yang dikatakan dialami oleh responden. Dengan ketiadaan bukti itu, Mahkamah Tinggi sepatutnya mengenepikan relif sampingan ini (lihat perenggan 35).

(4) Pihak responden telah gagal membuat suatu carian ke atas hartanah itu sehinggalah selepas dia telah berjaya membida di lelongan awam dan membuat tindakan sewajarnya untuk mendapatkan pinjaman. Atas sebab itu, responden tidak boleh menyalahkan perayu bagi apa-apa kerosakan atau kerugian yang dikatakan dialami oleh responden. Adalah

wajar untuk merumuskan bahawa responden telah membida hartanah itu dalam keadaan dia mengetahui, dan walaupun, terdapat bebanan, termasuklah kaveat perayu itu. Terdapat peruntukan yang spesifik, secara khususnya syarat 14 dan 16, dalam syarat penjualan yang dilampirkan kepada proklamasi penjualan, yang memberikan amaran bahawa jualan lelong adalah tertakluk kepada apa-apa bebanan termasuklah, sebagaimana yang diketahui, kaveat perayu itu. Sekiranya pihak responden telah membuat carian sebelum membuat bidaannya, sebagaimana responden dikehendaki untuk membuatnya menurut terma yang jelas dalam proklamasi penjualan itu, responden akan mengetahui tentang kewujudan kaveat itu. Sekiranya responden telah membuat bidaan walaupun mengetahui tentang kewujudan kaveat itu, dia tidak boleh kemudiannya mengadu tentang apa-apa kerosakan atau kerugian akibat daripada atau berkaitan dengan pembatalan kaveat itu. Dalam hal keadaan itu, pihak responden dengan jelas telah melepaskan haknya sendiri untuk mendapatkan apa-apa pampasan di bawah s 329(1) KTN (lihat perenggan 32–34).]

Notes

For cases on removal of caveats, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2775–2786.

Cases referred to

Darus v PP [1964] 1 MLJ 322 (refd)
Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212, PC (refd)
Jayanathan v PP [1973] 2 MLJ 68; [1973] 1 MLRA 586, FC (refd)
Khor Seek Pok v PP [1958] 1 MLJ 170 (refd)
Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324, FC (refd)
PP v Hew Yew [1972] 1 MLJ 164; [1971] 1 MLRH 58 (refd)
PP v Lee Ah Sam (F) [1949] 1 MLJ 236 (refd)
PP v Man bin Ismail [1939] 1 MLJ 207; [1938] 1 MLRH 241 (refd)
Rasidin bin Partorjo v Frederick Kiai [1976] 2 MLJ 214, FC (refd)
Score Options Sdn Bhd v Mexaland Development Sdn Bhd [2012] 6 MLJ 475; [2012] 7 CLJ 802, FC (refd)
Wong Kuan Tan v Gambut Development Sdn Bhd [1984] 2 MLJ 113, FC (refd)
Wong Sze Soon v Pegawai Pemegang Harta Malaysia & Anor [1995] 3 MLJ 57, HC (refd)
Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin [1997] 2 MLJ 487; [1997] 3 CLJ 854, CA (refd)

Legislation referred to

Courts Enactment (Cap 2) s 53
National Land Code ss 294, 323(1), 327, 327(1), 329, 329(1)

Prevention of Crime Ordinance s 15(4)
Vagrants and Decrepit Enactment (Cap 191) s 3(a)

Appeal from: Originating Summons No 24NCVC-1524–10 of 2015 (High Court, Kuala Lumpur)

Nuriahtun Maria bt Samad (Bhavani a/p Vadivelu and Tamisha a/p Rajendran with her) (Hakem Arabi & Assoc) for the appellant.
Wong Kok Yih (Kenneth Khoo Ewe Kong with him) (Ewe Chong & Khoo) for the respondent.

Mary Lim JCA (delivering judgment of the court):

[1] This appeal deals with a very defined and narrow point and that is, whether the order to pay compensation under s 329(1) of the National Land Code is mandatory or otherwise. Upon hearing both learned counsel, we decided the issue in the negative. Consequently, we unanimously allowed the appeal and set aside the order of the High Court on the order for payment of damages. These are our reasons.

[2] The appellant purchased from Md Anwar Shawkat Afser and Farzana Afsar ('original owners'), a service apartment ('the said property') located in a development known as '231 TR'. For this purpose, the parties entered into a sale and purchase agreement dated 20 December 2013 ('the SPA'). At that time, the said property was charged to United Overseas Bank (M) Bhd as the original owners had taken a loan from UOB. The appellant paid the original owners a total sum of RM67,200 comprising earnest deposit and retention sum, the latter for the purpose of compliance with tax regulations. The appellant herself secured financing of RM553,450 from CIMB Bank Bhd in order to purchase the said property. The sale was however, not completed and the appellant sued the original owners for breach of the SPA. Prior to the filing of the action, the appellant lodged a caveat against the said property on 8 July 2014. On 22 May 2015, the appellant entered summary judgment against the original owners following an action filed on 14 July 2014. That judgment remains unsatisfied.

[3] Meanwhile, UOB commenced foreclosure proceedings when the original owners defaulted on the loan. This led to a public auction on 9 July 2015, and that is where the respondent comes in. The respondent was successful in his bid and he paid RM73,000 to UOB with the balance of the purchase price to be paid within 120 days. The respondent, too, secured a loan for the purchase, this time; it was from RHB Bank Bhd.

[4] After his successful bid, the respondent conducted a search with the Land

Office (Wilayah Persekutuan) on 27 August 2015. His search yielded the existence of the caveat lodged by the appellant back on 8 July 2014. On 14 September 2015, the respondent wrote to the appellant requiring the appellant to remove the caveat that she had lodged. The appellant refused. The respondent then applied to court for its removal. The respondent claimed that as a result of the appellant's refusal to remove the caveat, he was unable to complete the sale within the stipulated time and that his deposit may be forfeited (*kebarangkalian kehilangan wang deposit*).

[5] The appellant contested the respondent's application. The learned High Court judge ruled in the respondent's favour finding that the appellant had no caveatable interest under s 323(1) of the National Land Code. Amongst Her Ladyship's reasons are that the sale of the said property was subject to a condition precedent in that the approval of the state authority was required given that the original owners were foreigners. According to Her Ladyship, should that approval be not forthcoming, then, there would be no sale and consequently no caveatable interest in the said property. Next, although aware of UOB's rights and UOB's intention to foreclose, the appellant failed to take any action to intervene or halt the auction. The learned High Court judge suggested that this was probably because the appellant was aware that her purchase of the said property was subject to a condition precedent which ultimately, was not fulfilled.

[6] The learned High Court judge further remarked that when the appellant commenced action against the original owners, the SPA was implicitly terminated. The appellant's interest and remedy was therefore purely contractual and not capable of registration, citing *Wong Kuan Tan v Gambut Development Sdn Bhd* [1984] 2 MLJ 113 and *Score Options Sdn Bhd v Mexaland Development Sdn Bhd* [2012] 6 MLJ 475; [2012] 7 CLJ 802 in support — see paras 16–17 of the judgment. This again left the appellant with no interest over the said property to be caveated in which case the caveat lodged must be removed. And so the caveat was ordered to be removed with the court further ordering the appellant to pay damages to the respondent and for such damages to be assessed by the senior assistant registrar — see p 357 of the record of appeal. On 8 September 2016, the learned SAR assessed damages to be the sum of RM81,032.32 (including charges for late payment, solicitors' costs and loss of rentals).

[7] The appellant is dissatisfied with the consequential order to pay damages; hence the appeal. There is no appeal on the removal of the caveat.

[8] It is the appellant's submission that on a proper reading of s 329(1) of the National Land Code, the court always retains discretion to award compensation consequent to a wrongful entry of a caveat. The respondent

A contends otherwise, that the court is mandatorily required to order compensation when a caveat has been wrongfully or without reasonable cause, entered or where a person fails to withdraw a caveat.

B **[9]** We cannot discern from the grounds of judgment the reasons why the learned High Court judge ordered the order for damages. Upon being satisfied that the caveat ought to be removed, Her Ladyship simply proceeded to allow the respondent's application with costs. One of the reliefs sought in the application was for the payment of damages — see prayer (c) at p 10 of the record of appeal. Be that as it may, it is our considered view that s 329 of the C National Land Code does not provide, in any way, for the mandatory payment of compensation. In the absence of clear and express words to the contrary, any order to pay any compensation is always a matter of discretion, subject to the establishment in law and on the facts that compensation is required to meet the D ends of justice.

[10] We have arrived at this conclusion from a careful reading of s 329, that it is our respectful view that the order to pay compensation always remains a matter of discretion of the ourt; and that discretion is exercised upon the E general principles of compensation. These are the terms of s 329(1) and it reads as follows:

> 329 Compensation for wrongful caveats, and limitation on repeated applications
>
> (1) Any person or body who, wrongfully or without reasonable cause, secures the F entry of, or fails to withdraw, any private caveat shall be liable to pay compensation to any person or body who thereby suffers any damage or loss.

[11] Section 329 must be read with s 327 which reads as follows:

G
> 327 Removal of private caveats by the Court
>
> (1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, ex parte) may make such order on the application as it may think just.

H

[12] In the present appeal, the court below was moved to remove a private caveat pursuant to s 327(1). In order to procure such an order, the respondent needs to show that he is a person 'aggrieved'. As elaborated by Lord Diplock in *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 and as discussed in I *Wong Sze Soon v Pegawai Pemegang Harta Malaysia & Anor* [1995] 3 MLJ 57 at p 62H and *Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487; [1997] 3 CLJ 854, an 'aggrieved person' is one aggrieved by the existence of the caveat. Such a person is dissatisfied with or is adversely affected by the wrongful

act of the appellant, the wrongful act being the entry of the private caveat. The respondent was successful in establishing that on the facts and there is no appeal against that finding. A

[13] It is clear to us that s 329 casts upon the caveatee, that is the appellant, a liability to pay compensation. That liability arises only in the circumstances as defined under s 329(1) and that is where the appellant has wrongfully entered the private caveat; where the appellant has lodged the caveat without reasonable cause; or where the appellant has failed to withdraw the caveat, presumably after being asked to do so or when the appellant realises that the caveat ought to be removed but fails to do so. In such instances, s 329(1) provides that the appellant shall be liable to pay compensation. B C

[14] Again, such payment of compensation is only where the person has suffered damage or loss by virtue of such caveat — 'pay compensation to any person or body *who thereby suffers* any damage or loss'. (Emphasis added.) This clearly means that before the order for compensation may be made, the court must be satisfied that damage or loss by reason of the caveat has been established on the facts and in law. These terms in s 329(1) are not surplusage but are instead the conditions which must be met before compensation may be ordered. D E

[15] The respondent, as the aggrieved party bears the burden of proving liability to pay compensation. The court must be satisfied, on a balance of probabilities that liability is attached on the particular facts and circumstances. To suggest that s 329(1) is mandatory in that the court must necessarily order compensation upon a removal of a caveat under s 327 is to read into s 329 words and intention that are just not there. Section 329(1) provides for a liability to pay; it does not provide that the appellant shall pay compensation for the wrongful entry of the caveat. F G

[16] Some guidance may be obtained from a steady line of decisions pronouncing the effect of similar provisions under criminal law; that upon proof of a particular charge, the terms 'shall be liable to' are not mandatory in effect and purpose. Such terms leave the court with entire absolute discretion as to the suitable punishment which the court wishes to mete out in the particular facts, taking into account any mitigating circumstances which may be present. In *Public Prosecutor v Man bin Ismail* [1939] 1 MLJ 207; [1938] 1 MLRH 241, Aitken J, acting under the 'full powers of supervision and revision' under the then s 53 of the Courts Enactment (Cap 2), quashed the conviction of the accused who was found guilty of an offence under s 3(a) of the Vagrants and Decrepit Enactment (Cap 191). The accused had been found on the bank of the Perak River at Kuala Kangsar 'lodging in the open air not having any ostensible means of subsistence'. The accused had hitched hike his way to H I

Kuala Kangsar from Kuala Lumpur in search of his uncle. The accused pleaded guilty to the charge and was subsequently sentenced to ten days rigorous imprisonment by the learned magistrate. On the matter of the sentence, Aitken J said:

> It would also seem that the learned Magistrate, who tired this particular case, was under the impression that because the section provides that every person found guilty of an offence against it 'shall be liable to imprisonment for six months', therefore he was compelled to pass some sentence on such a person however many mitigating circumstances might be present. If that was his impression, then in my opinion he was under an entirely wrong impression as to the meaning of the words 'shall be liable to'. To my mind they give the court an absolute discretion as to whether it shall award a sentence of imprisonment or deal with the accused under and in accordance with the probationary provisions of s 294 of the Criminal Procedure Code. If the Legislature had intended that all persons convicted of an offence against this s 3(a) of the Vagrants and Decrepit Enactment should be sent to prison, whatever the circumstances may be, it would have used the expression 'shall be punished with imprisonment', which is to be found so frequently in our Penal Code.

[17] This approach was adopted and applied by Raja Azlan Shah J (as HRH then was) in *Public Prosecutor v Hew Yew* [1972] 1 MLJ 164; [1971] 1 MLRH 58. It was recognised in that case that the words 'shall be liable' had received several judicial pronouncements such as *Public Prosecutor v Lee Ah Sam (F)* [1949] 1 MLJ 236, *Khor Seek Pok v Public Prosecutor* [1958] 1 MLJ 170, and *Darus v Public Prosecutor* [1964] 1 MLJ 322; that these words do not mean that the provision is mandatory. In the instant case, s 15(4) of the Prevention of Crime Ordinance was under scrutiny and the provision reads as follows:

> ... shall be liable to imprisonment for a term not exceeding five years and not less than two years.

[18] His Lordship opined that:

> From that it seems to me that *the court has an absolute discretion* to impose the maximum sentence of five years or any lesser sentence the minimum of which must not be less than two years. (Emphasis added.)

[19] The above decisions were implicitly affirmed by the Federal Court in *Jayanathan v Public Prosecutor* [1973] 2 MLJ 68; [1973] 1 MLRA 586.

[20] That is the position under criminal law. A fortiori, the position would hold equally true for like provisions under civil law. It is clear that s 329(1) is couched along similar terms. Had the Legislature intended that compensation be paid regardless whether damage or loss is in fact suffered, as suggested by the respondent, then the words that the appellant 'shall pay compensation to any person or body' would have to be used. Instead, the words appearing in s

329(1) are that the appellant 'shall be liable to pay compensation'. Consequently, it would be wrong for the court to read into s 329(1) a meaning that was never intended.

[21] We are fortified in our reading of the intent of s 329(1) when we see that the term 'compensation' is used in the provision itself. *Black's Law Dictionary* (Deluxe 9th Ed) defines the term, 'compensation' as referring to 'the payment of damages, or any other act that a Court orders to be done by a person who has caused injury to another'.

[22] Given that s 329(1) itself requires that compensation is only for damage or loss which is 'thereby' suffered, it is evident that proof of the existence of damage or loss is first of all, required. The respondent must prove on a balance of probabilities that he has suffered a particular damage or loss 'thereby' or as a result of, the wrongful act of the appellant. How is compensation to be ordered unless there is in existence proof of the damage or loss allegedly suffered? Damage or loss is not presumed for this wrongful act; it must be established in law and on the facts. If the respondent fails to discharge that burden, the court may either refuse compensation or order nominal compensation to be paid. Until and unless the respondent has discharged that burden, it would be an improper exercise of discretion by the court to order any compensation or assessment. Until and unless the court is so satisfied, it would be wrong for the court to direct an assessment of the amount, be it by the court itself, or as in this case, by the learned SAR. As it is, the learned High Court judge did not address this matter of compensation under s 329(1).

[23] Consequently, the respondent's entitlement to compensation remains very much a matter of absolute discretion of the court. The order to pay compensation is not automatic but subject to proof of the existence of damage or loss suffered. Since there was none, for this reason alone, the appeal must be allowed as the High Court had granted the order in prayer (c), seemingly as a matter of course.

[24] Further and in any event, the court's discretion in matters of compensation is exercised according to established principles of compensation awarded for a wrongful act. Monetary compensation is generally awarded to compensate, so far as money can compensate and give reparation for the wrongful act done. Its intent is to restore the claimant to the original position; hence the principle of compensation *restitutio in integrum*. This principle has been well set down in two oft-quoted decisions of the Federal Court. First, in *Rasidin bin Partorjo v Frederick Kiai* [1976] 2 MLJ 214 where Wan Suleiman FJ stated:

> The principle for assessing damages has been stated by Viscount Dunedin in *Admiralty Commissioners v SS Susquehanna* as follows:

A

> ... the common law says that damages due ... for tort are damages which, so far as money can compensate, will give the injured party reparation for the wrongful act ...

B

[25] Second, in *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324 where Syed Agil Barakbhah FJ said:

> Damages for personal injuries are not punitive and still less a reward. They are simply compensation that will give reparation for the wrongful act and for all the natural and direct consequences for the wrongful act, so far as money can compensate. *British Transport Commission v Gourley* and *H West & Son Ltd v Shepard* [1963] 2 All ER 625. The award under general damages should be a global sum commensurate with the injury sustained and not a full compensation which might result in ruinous consequences to the defendant (per Sir Alexander Cockburn LJ in *Phillips v South Western Railway Co* (1879) 4 QBD 406).

C

D

[26] As clearly set out in the above dicta, the amount or measure of damages to be awarded need not be full compensation. What is important is that the amount of compensation is fair and adequate, not excessive.

E

[27] At paras 12, 14–15 of his supporting affidavit (pp 15–16 of the record of appeal), and also at para 15 of the affidavit in reply (p 128 of the record of appeal), the respondent averred that the existence of the caveat has resulted in the non-release of the loan; that he will lose his deposit because of his failure to settle the balance of the purchase price within the agreed period; and that he will suffer damages in terms of costs of expenditure, loss of profit and loss of investment. He had offered in evidence, two exhs 'D1' and 'D2' which is a letter dated 14 September 2015 from his solicitors to the appellant together with the acknowledgment of posting seen at pp 47–48 of the record of appeal.

F

G

[28] We have perused the letter sent to the appellant; it merely informs the appellant of the respondent's recent land search and discovery of the appellant's caveat. It notifies and demands the removal of the caveat lodged within seven days failing which the respondent will proceed with 'necessary legal proceedings against you for damages and costs whatsoever incurred for the removal of the said caveat and losses (if any) resulting from the failure to remove the said caveat'.

H

[29] Aside from this letter and his averments, there is no evidence to prove the claim of damage or loss. There is no evidence of a forfeiture of the payment of the deposit, or evidence of any costs of any expenditure, loss of profit or loss of investment. Without any evidence of any loss, we cannot see how the learned judge could have any basis to exercise her discretion and order compensation to be paid, the amount of which was to be determined by the learned SAR. There

I

was simply no evidence laid before the court for the court to order that particular relief.

[30] What is further clear is that any damage or loss that the respondent claims to have sustained, which we do not find established, were actually damage or loss which the respondent himself appears to have been prepared to bear in the first place. We have reached this conclusion because of the terms of the proclamation of sale itself.

[31] The proclamation of sale found at pp 19–26 of the record of appeal, clearly warns all members of the public who intend to bid at the public auction of the said property to amongst others, conduct an official title search at the relevant land office. The warning is set out in bold and underlined terms:

> *NOTE:* Prospective bidders are advised to inspect the subject property, seek independent legal advice on the Conditions of Sale, conduct an official title search at the relevant Land Office and to make inquiries with the Developer and/or other relevant authorities on the terms of consent to the sale herein prior to the auction sale. The successful bidder shall be responsible to obtain the consent of the Developer for direct transfer if individual/strata title issued.

[32] The proclamation advised that the public auction would be held on 9 July 2015. Although there is no indication when this proclamation was actually notified, it would be fair to say that the usual practice of 7–14 days' notice for the conduct of public auctions would have been given. This gives the respondent adequate time to conduct a title search at the relevant land office before bidding for the said property. The respondent did not. In fact, from his own solicitor's letter dated 14 September 2015, the respondent did not conduct the search until after he had made his bid and he had been successful in his bid. And, it would appear that he did so even after he had made the necessary arrangements for the loan. Under such circumstances, the appellant cannot lay any blame on the appellant for any damage or loss that he claims to have suffered. It would be reasonable to conclude that he was bidding for the said property, knowing of and despite the encumbrances, including the appellant's caveat.

[33] Furthermore, the proclamation notified that the 'subject property' will be sold on an 'as is where is basis'. Then, there are specific provisions in the conditions of sale, again warning or alerting the respondent to his obligations. Under conditions 14 and 16 of the conditions of sale, the respondent, as are all other interested members of the public are informed that:

> 14. The Property is sold subject to all existing easements, leases, tenancies, occupiers, charges, caveats, previous sale and purchase, previous assignment, covenants, liabilities subsisting thereon or thereover and the Purchaser shall be deemed to have full knowledge of the state and condition of the Property.

15. ...

16. The Property is believed and shall be taken to be correctly described and is sold subject to all express conditions, restrictions-in-interest, easements, leases, tenancies, occupiers, charges, caveats, previous sale and purchase, previous assignment, covenants, liabilities (including but not limited to liabilities to local authorities incurred but not ascertained and any rates made but not demanded), encumbrances and rights, (if any), subsisting thereon or thereover without any obligation arising to define the same respectively and the Purchaser shall be deemed to have full knowledge of the state and conditions of the Property and no error, mis-statement, omission, or mis-description shall annul the sale nor shall any compensation be allowed in respect hereof.

[34] Although these terms are in the one sense inter partes and applicable between UOB and the respondent, the successful bidder, these terms nevertheless bind any person who would be interested in bidding at the auction. That would certainly extend to the respondent. These terms and conditions warn that the auction and thereby the sale would be subject to any encumbrances, including as it turned out the appellant's caveat. Had the respondent conducted the search before making his bid, which he was obliged to under the clear terms of the proclamation, he would have discovered the existence of the appellant's caveat. Had he proceeded to bid despite that knowledge of the existence of the caveat, he cannot turn round and complain in the event any damage or loss results from or related to the removal of the caveat. With the clear terms of the warning as well as conditions 14 and 16 in the proclamation, while the respondent may be entitled to the removal of the caveat, the respondent has clearly disentitled himself to any compensation, especially under s 329(1) of the National Land Code.

[35] Ultimately, as was already pointed out, save for the respondent's averments, there was no evidence before the court below of any damage or loss that the respondent claimed to have suffered. Certainly, there was no evidence that the deposit that he had paid had been forfeited or that he had suffered a loss of investment, or loss of profit. In the absence of proof, there was no basis for any exercise of discretion to order payment of compensation by the appellant. In order to direct any assessment, the court below was also obliged to identify, with evidence led by the respondent, the particular items or heads of damage or loss that the respondent purportedly sustained. With the complete absence of such proof, the learned judge ought to have dismissed this ancillary relief.

[36] In the result, we were compelled to allow the appeal. Accordingly, we allowed the appeal with costs of RM3,000 subject to payment of allocator fees. Order (c) of the order of the High Court dated 31 March 2016 is set aside. Lastly, we order the refund of the deposit.

Appeal allowed and order set aside.

Reported by Ashok Kumar